

REMAINING AN UPRIGHT PERSON WHILE EARNING A SATISFACTORY LIVING

by

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A fact of life for lawyers is the potential conflict between being a zealous advocate for one's client and doing the "right thing." The preamble to the Minnesota Rules of Professional Conduct acknowledges this when it observes that "virtually all difficult ethical problems arise from the conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living."

While not minimizing this very real dilemma, it is worth noting that lawyers can sometimes reduce this conflict by being as cognizant of their role as advisor and counselor to their clients as they are of their role as advocate. A recent advisory opinion request illustrates this point.

Divorce dilemma

The lawyer represented the husband in a divorce. The husband had a prior criminal conviction for indecent conduct involving a stepchild from a previous marriage. The husband and wife also had a daughter of their own.

Due to husband's prior conviction, visitation with his daughter was supervised. However, the husband asked the lawyer to negotiate unsupervised visitations into the divorce decree. The wife was receptive to unsupervised visitation, apparently based in part upon her difficulty in arranging childcare. The husband's psychologist was opposed to unsupervised visitation, based upon her concern that husband was not yet ready for such visits and that unsupervised visitation might increase his risk of re-offending.

The lawyer inquired about the existence of an ethical duty to the child that would prevent him from seeking unsupervised visitation. The lawyer was attempting to balance his responsibility to his client against his own desire to remain "an upright person" and to avoid doing anything that might place the child at risk.

Although the Minnesota Rules of Professional Conduct (MRPC) imposed no duty on the lawyer to protect the child's interests, neither did they require him to abandon his desire to be an upright person. The lawyer appeared to view his duty to his client in a narrow manner (i.e., simply carry out the client's wishes), and had ignored the fact that his professional obligation included a responsibility to counsel the client and fully advise him of the risks associated with the client's intended course of action.

The lawyer was aware that pursuing the husband's directive was probably not in the husband's best interest. For example, unsupervised visitation might (beyond the risk to the child) place the husband in a situation where he was more likely to re-offend and result in criminal charges and the risk that even if the husband did nothing improper, that he was exposing himself to accusations of inappropriate conduct. Nevertheless, the lawyer had not counseled the husband regarding these concerns.

Rule 1.2(a) of the MRPC provides that a lawyer shall "abide by a client's decisions concerning the objectives

of representation [subject to certain limitations] and shall consult with the client as to the means by which they are to be pursued.”

However, the rules also provide that a lawyer “shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” MRPC Rule 1.4(b).

Duty and obligation

The lawyer’s ethical obligation to the husband was not limited to unquestioningly including the unsupervised visitation into the marital termination agreement. The lawyer also had an ethical duty to fully explain the matter, including the risks of pursuing the husband’s directive, so that the husband could make an informed decision.

It is important to note that even if after consultation the husband wished to pursue the unsupervised visitations, the lawyer could not substitute his judgment for that of the husband. See MRPC Rule 1.2. At the same time, MRPC Rule 1.16(b)(2) permits lawyers to withdraw from the representation if the client “insists upon pursuing an objective that the lawyer considers repugnant or imprudent.”

Depending upon the circumstances, the lawyer may have had a basis for withdrawing, although his withdrawal would have been subject to other ethical and legal restrictions (e.g., the lawyer could not withdraw without providing reasonable notice to the client).

A lawyer’s responsibilities to clients may occasionally conflict with the lawyer’s own interests in doing the right thing. However, lawyers’ ethical duties to their clients include thoroughly discussing matters with clients and helping them to see where their interests lie.

Further, when a client insists on pursuing an objective the lawyer considers repugnant, the lawyer may have a basis for withdrawing from the representation. It is possible for the lawyer to remain “an upright person while earning a satisfactory living.”